

Message Text

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TAGS: ETRD, GW

SUBJECT: ANTITRUST CASE U.S. V. IBM

REF: (A) STATE 069913, (B) BONN 11544

1. FOLLOWING IS FURTHER TO OUR RESPONSE CONTAINED REFTEL B. QUESTION POSED IN PARA 8, REFTEL A, IS WHETHER IBM DEUTSCHLAND, GMBH COULD BE SUED IN THE FRG FOR DAMAGES ON THE BASIS OF A US COURT FINDING THAT IT HAS MONOPOLIZED THE INDUSTRY. PURSUANT TO THIS QUESTION, EMBOFF CONTACTED COGNIZANT FRG ECONOMICS MINISTRY OFFICIAL. IBM'S NAME WAS NOT MENTIONED. WHILE RELUCTANT TO ANSWER A COMPLEX QUESTION WITH A SHORT ANSWER, MINISTRY OFFICIAL PROVIDED INFORMATION BELOW, WHICH MAY BE MADE PART OF THE PUBLIC RECORD, BUT WITHOUT ATTRIBUTION.

2. THE FRG ANTI-CARTEL LAW MAKES PROVISION FOR LIABILITY TO COMPENSATE A COMPETITOR FOR DAMAGE SUSTAINED BY REASON OF THE WILLFUL OR NEGLIGENT VIOLATION OF THAT LAW. IN A CIVIL PROCEEDING IN WHICH THE PLAINTIFF ALLEGES THAT HE HAS SUSTAINED DAMAGE FROM THE BUSINESS PRACTICES OF THE DEFENDANT, THE FRG COURT WOULD PROBABLY CHECK (IF NO RELEVANT FRG CONVICTION IS ON THE RECORD) AS TO WHETHER THE FEDERAL CARTEL OFFICE (FCO) IS CONDUCTING ANY INVESTIGATION OF THOSE BUSINESS PRACTICES OF THE DEFENDANT

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RELEVANT TO THE CIVIL DAMAGE ACTION. IF NO SUCH INVESTI-

GATION IS UNDERWAY, THE COURT WOULD CONSIDER THE CHARGES IN LIGHT OF THE ANTI-CARTEL LAW. HOWEVER, THE PLAINTIFF WOULD NOT HAVE THE BENEFIT OF THE INVESTIGATIVE CAPACITY OF THE FCO AND WOULD HIMSELF NEED TO MEET THE SUBSTANTIAL BURDEN OF PROVING A VIOLATION OF FRG CARTEL LAW. ON THE OTHER HAND, IF THE FCO WERE CONDUCTING AN INVESTIGATION OF THE DEFENDANT, THE PLAINTIFF WOULD IN ALL PROBABILITY BE INCLINED TO DEFER BRINGING HIS ACTION UNTIL THE INVESTIGATION HAD BEEN COMPLETED BECAUSE OF THE POSSIBILITY THAT THE RESULTS COULD LEAD TO A PROSECUTION AND CONVICTION. THE LATTER WOULD RELIEVE THE PLAINTIFF OF THE BURDEN OF PROVING A VIOLATION OF THE LAW AND LEAVE HIM ONLY THE NEED TO PROVE INJURY AS A RESULT OF THE DEFENDANT'S PROHIBITED ACTIVITIES, FOR WHICH PLAINTIFF SHOULD THEREFORE BE COMPENSATED.

3. A US COURT'S FINDING IN CIVIL OR CRIMINAL ANTITRUST LITIGATION THAT A US FIRM HAD VIOLATED US ANTITRUST LAWS WOULD NOT REPEAT NOT IN AND OF ITSELF CONSTITUTE A BASIS IN THE FRG FOR A CIVIL CLAIM AGAINST THAT FIRM FOR DAMAGES. THE US COURT'S DECISION WOULD NOT IN ITSELF BE ACCORDED EXTRATERRITORIAL EFFECT EVEN FOR THE LIMITED PURPOSE OF ESTABLISHING FACTS RELEVANT TO A FRG CIVIL PROCEEDING. A FRG COURT HANDLING SUCH A PROCEEDING WOULD NEED TO EXPLORE WHETHER THE FRG ANTI-CARTEL LAW WAS VIOLATED BY THE ACTS FOUND TO HAVE VIOLATED US LAWS OR BY ADDITIONAL ACTS. HOWEVER, SOME OF THE EVIDENCE ADDUCED AT THE US TRIAL AND THE FACTS ON WHICH ANY CONVICTION IS BASED COULD CONSTITUTE FAIRLY PERSUASIVE EVIDENCE IN THE EYES OF AN FRG COURT IN AN ACTION FOR CIVIL DAMAGES UNDER THE FRG ANTI-CARTEL LAW. THE FACTS ADDUCED OR PROVED IN A US ANTI-TRUST ACTION COULD ALSO FORM A DEPARTURE POINT FOR AN FCO INVESTIGATION OR COULD SUPPORT FINDINGS ALREADY REACHED BY THE FCO, THUS ULTIMATELY HAVING AN EFFECT ON THE DECISION WHETHER TO PROSECUTE AN FRG SUBSIDIARY OF THE US DEFENDANT FIRM FOR VIOLATIONS OF THE FRG ANTI-CARTEL LAW.

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